11110

(17,753.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

vs.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1899, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the tenth day of April, A. D. 1899, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, wherein The Northern Assurance Company of London, England, was plaintiff in error and The Grand View Building Association was defendant in error; which said transcript of record is in the words and figures following, to wit:

1 Pleas before the Honorable William H. Munger, judge of the district court of the United States for the district of Nebraska and sitting in the circuit court of the United States for the district of Nebraska, within the eighth judicial circuit, at the November, 1898, term thereof.

Be it remembered that on the 30th day of September, 1898, transcript from district court of Lancaster county, Nebraska, was filed in the clerk's office of said circuit court, which said transcript is in words and figures following, to wit:

23, 265.

Transcript.

Pleas in the district court of the third judicial district of Nebraska in and for the county of Lancaster.

At the September, A. D. 1898, term of said court, begun and held in the said city of Lincoln, in said county and State, on the 5th day of Sept., in the year of our Lord one thousand eight hundred and ninety-eight, and on a day therein, to wit, on the 29 day of Sept., A. D. 1898 (that being a day in vacation after September, A. D. 1898, term of said court)—present, Hon. Albert J. Cornish, judge presiding—the following proceedings were had and done, to wit:

Be it remembered that at the several times hereinafter set forth were filed in the office of the clerk of said court papers of which the following are true and correct copies, and proceedings, among

others, were had and done in the cause below named before ——, judge presiding, as follows:

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant. } Petition.

Petition.

Plaintiff complains of the defendant and for cause of action says:

1. Plaintiff is a corporation organized under the laws of Nebraska. The defendant is a corporation incorporated under the laws of the Kingdom of Great Britain and Ireland with power to insure property in the State of Nebraska against loss or destruction by fire.

2 2. On the 31st day of December, 1896, plaintiff was the owner of certain household and kitchen furniture and other articles of personal property hereafter described, situate in the three-story brick and stone building with slate roof on lot "F," in Grand View Residence Park addition in Lancaster county, Nebraska, occupied as a boys' military and boarding academy, which said personal property was of the value of $5,722.49.

On said December 31st, 1896, the defendant in consideration of the sum of $33.75 to it then paid by plaintiff as an insurance premium made and delivered to the plaintiff a policy of insurance on said property, a true copy whereof is hereto attached and made a part of this petition marked "Exhibit A," by the terms whereof defendant insured plaintiff for the term of two years from the 31st day of December, 1896, at noon to the 31st day of December, 1898, at noon against all direct loss or damage by fire to an amount not exceeding twenty-five hundred ($2,500) dollars to all of the aforesaid property while so located, which said property was in said policy referred to and described in the words following:

"Nothing on the three-story brick and stone building with slate roof and its additions including foundations and all fixtures and attachments of every description belonging to said building while occupied for dwelling purposes only, situated on lot F in Grand View Residence Park addition (referring to an addition to the city of Lincoln in Lancaster county, Nebraska), occupied as a boys' military and boarding academy.

$2,500.00 on household and kitchen furniture of every description, useful or ornamental, bedding, family wearing apparel, watches and jewelry in use, plate and plated ware, musical instruments, sewing machine, printed books and music, pictures, paintings, engravings and mirrors and their frames (at not exceeding cost), amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel and family stores, all while contained in the above-described building."

3. On the first day of June, 1898, during the term of said insurance and while said policy was in full force the aforesaid property of plaintiff covered by said insurance was burned and wholly destroyed by fire; and such fire was not caused by any act or neglect of plaintiff.

4. Plaintiff shortly prior to issuance of the aforesaid policy by defendant had procured a policy of insurance from the Firemen's Fund Insurance Company, incorporated under the laws of
3 California, insuring it against loss by fire, of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire.

The fact of said subsisting insurance in said company was by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of its said policy and prior to payment by plaintiff of said premium therefor and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf and collect and receive therefor and who in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that "it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance" on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy notwithstanding said condition. Plaintiff had no insurance on said property except as before stated.

5. On or about the 26th day of July, 1898, within sixty days from date of said fire, the plaintiff rendered and delivered to defendant a statement signed and sworn to by its president giving all the particulars of said fire, and of its loss and damage thereby sustained by the terms of said policy required which the defendant accepted and still retains; and plaintiff on its part has complied with all the conditions of said policy.

6. The plaintiff was owner of said property when so destroyed by fire and the same was then of the value of $5,722.49 and a schedule of the items thereof is hereto attached marked "Exhibit B" and made a part of this petition.

7. On the 26th day of July, 1898, the plaintiff demanded of defendant the payment of said insurance; and defendant disregarding its undertaking in that behalf denies liability on the sole ground that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance, the same provision which as aforesaid it had waived at time of issuing its said policy.

8. No part of said insurance has been paid and there is now due

and payable thereon from defendant to plaintiff the sum of
4 two thousand five hundred ($2,500) dollars with interest thereon from the 26th day of July, 1898. Wherefore plaintiff prays judgment against defendant for the sum of two thousand five hundred ($2,500) dollars, with interest thereon from the 26th day of July, A. D. 1898, and costs of suit.

HALLECK F. ROSE,
Attorney for Plaintiff.

STATE OF NEBRASKA, }
Lancaster County, } ss:

H. J. Walsh, being duly sworn, says on oath plaintiff is a corporation; I am its president and believe the facts stated in the foregoing petition are true.

H. J. WALSH.

Subscribed in my presence and sworn to before me this 30th day of August, 1898.

[SEAL.]

J. K. HONEYWELL,
Notary Public.

EXHIBIT "A."

Here follows copy of policy, original of which appears in the bill of exceptions.

EXHIBIT "B."

Inventory of Furnishing Goods in Worthington Military Academy, Lincoln, Nebraska.

2 chairs, .76; 1 bed, 3.50; 1st springs, 1.25	5.51
1 mattress, 2.10; 1 mirror, 1.25	3.35
1 kitchen table, with drawers	1.50
1 pillow, .80; water can, .90; 1 basin, .55	2.25
1 steam table, 45.00; 1 boiler, 40.50	85.50
1 set-pan, 6.50; 1 laundry stove, 14.00	20.50
1 wire mat, 5.50; 1 saucepan rack, 13.50	19.00
4½ doz. chairs	42.97
3 hampers, 10.50; 4 chairs, 20.00	30.50
1 parlor set, 42.50; 1 chair, 8.00	50.50
1 chamber set, 22.00; 1 mattress, 18.00	40.00
1 lamp, 35c.; 1 potato-slicer, 4.25	4.60
1 coffee-mill, 6.75; 1 ice-cream freezer, 6.85	13.60
1 vig.-slicer, 4.90; 1 set scales, 3.10	8.00
1 range, 96.00; 6 pails, .96	96.96
2 flour cans, 1.80; 3 clothes-horses, 2.85	4.65
3 sugar cans	1.20
2 office chairs, 10.50; 2¾ doz. chairs, 46.75	57.25
5 doz. chairs, 22.50; 56 mattresses, 263.20	285.70
1 (*rice*) cooking utensils	109.61
3 desks, 51.25; 1 settee, 15.00	66.25

5	1 bed-room set	22.00
	1 set springs, 1.25; 1 mattress, 5.60	6.85
4	mirrors, 3.70; 1 set springs, 3.23	6.93
56	iron beds	288.00
7	tables	45.00
4	hall seats	51.00
1	coffee urn, 20.50; 1 tea do., 10.50	31.00
1	set Rogers' knives & F., 2.90; 1 set T. spoons, 2.13	5.03
1	set tablespoons, 3.00; 8 commodes, 40.00	43.00
6	pillows, 13.00; 1 suit, 22.00; 2 wardrobes, 16.00	51.00
4	tables, 7.75; 2 mattresses, 11.00; 2 sets springs, 2.50	21.25
60	desks, 210.20; 27 seats, 152.80	363.00
1	set charts & globe	160.00
1	zinc box, 2.00; 1 armchair, 8.60; 2 drip-pans, .40	11.00
		$2,054.45
		$2,054.45
4	kitchen tables, 6.46; 1 Rockford table, 33.75	40.16
6	spoons, .45; grater, .05	.50
1	potato-masher, .30; 1 sifter, .25	.55
1	saucepan, 2.75; 3 dippers, .45	3.20
3	covers, .25; 1 dresser & commode, 17.00	17.25
1	chair, 1.10; 1 rocker, 1.50	2.60
36	commodes	116.10
1	kitchen table	3.23
1	dish-pan, .65; 2 doz. Rogers' knives & forks, 11.60	12.25
1½	doz. tablespoons, 6.38; 4 doz. tea do., 8.80	15.18
½	doz. butter knives, 2.30; ½ doz. sugar spoons, 1.88	4.18
1	wringer, 2.60; 1 wardrobe, 8.00	10.60
10	commodes, 32.30; 1 wardrobe, 7.00	39.30
1¼	doz. chairs, 6.05; 1 chop bowl & knife, .80	6.85
4	scoops, .72; 1 oatmeal cooker, 2.00	2.72
1	hod, .45; 1 do., .60	1.05
2	lawn settees, 6.50; 1 refrigerator, 87.50	94.00
1	bell, 1.50; 1 step-chair, 1.50	3.00
1	step-ladder, 2.50; 1 pr. shears, .75	3.25
1	brush, .75; 1 doz. knives & forks, 8.25	9.00
1	dish-pan, 1.10; 3 tin pans, .15	1.25
1	carpet-sweeper, 3.00; 1 scoop, 1.25	4.25
1	iron roasting pan (to order)	4.90
1	rocker, 4.00; table, 6.00; 1 rocker, 2.50; 3 settees, 10.00	22.50
1	thermometer, .90; 1 cot mattress, 3.75	4.65
2	doz. glasses, 1.00; 1 bed R. set, 27.00	28.00
	1 mattress, 7.00; 1 pr. pillows, 4.00	11.00
6	1 table, 10.00; 1 rocker, 5.00; 1 sew. rocker, 3.50; springs, 4.50	23.00
1	doz. milk-pans, 1.60; oil stove, .50	2.10
1	tin basin, 10c.; 2 bookcases, 20.00	20 10

1 but. paddle, .15; 1 pail, .25; 1 set cover, 1.50; 2 mirrors, 2.00	3.90
1 stool, .80; 2 pans, .60; 12 pans, 1.00	2.40
1 set irons, 1.35; 3 brushes, 1.50	2.85
1 teapot, 1.30; strainer, .10	1.40
3 set- covers, 4.05; 1 griddle, .50	4.55
	$2,576.27
1 flour-sifter, .25; 1 kitchen table, 1.75	2.00
1 stool, .90; 1 pail, .25; cookers, 3.50	4.65
1 bread pan, 1.15; 1 mirror, 1.10	2.25
1 wardrobe, 9.00; 3 bells, .35	9.35
2 rockers, 4.20; 1 tea kettle, .90	5.10
1 bucket, 1.25; 1 scoop, 1.00	2.25
3 joints of pipe, 1.70; 1 mirror, .75; caster, .10	2.55
1 pillow, 1.50; 1 chop-bowl, .65	2.15
1 drip-pan, to order	1.75
1 egg-beater, can-opener & sifter	1.20
1 bread-riser, .15; mustard spoons, .15	.30
1 Sech water front	10.75
1 mouse trap	.45
2 candlesticks, .20; coffee-boiler, 2.00	2.20
1 kit. table, 1.35; 1 can, .30	1.65
1 kit. table, 1.75; 1 fork, .10	1.85
960 ft. matting, 5.76; 210 ft., 1.26	7.02
2 paring knives, .25; sieve, .20	.45
1 can, .50; 1 chop-bowl, .35	.85
2 butter paddles, .20; caster, .35; 1 kettle, .70	1.25
1 doz. tablespoons, 1.00; 1 water-cooler, 5.00	6.00
2 towel racks, .20; 23 yds. carpet, 19.55	19.75
6 milk pans, .90; mirrors, .65	1.55
1 waffle iron, .90; pail, .35	1.25
1 pr. scissors, .50; 1 pail, .40	.90
Knives & forks, .30; 1 cooker, 1.25	1.55
12 milk pans, 1.65; 1 masher, .45; egg-whipper, .05	2.15
1 set covers, 3.00; 1 kitchen table, 1.50	4.50
1 sew. *9* table & kitchen table	3.00
1 waffle iron, .90; 1 officers' table, 2.25	3.15
1 pail, .35; 1 wash-dish, .30	.65
2 milk-covers, .70; 1 pail, .80	1.50
7 1 kettle, .65; 3 kitchen chairs, .50	1.15
3 knives and forks, .35; dipper, .60	.95
	2,684.44
Spoons	.55
1 cake-turner, .30; kettle, 1.00	1.30
3 trays	1.50
2 dish-pans	1.75
Apple-parer	.90
1 piece carpet	1.25
Scissors & lamp	1.65

1 skillet, .60; can, .40	1.00
Knives, .30; kettle & grater	.95
1 porcelain kettle	1.00
1 pot fryer	.35
1 egg basket	.15
1 galv. pan, .50; hose, 7.00	7.50
2 knives, .25; 6 pans, .90	1.15
12 dust-pans	.90
2 slop-pails, .80; 2 do., .50	1.30
6 chairs, 5.50; 2 do., 3.50	9.00
1 table, 6.25; 1 do., 16.50	22.75
2 rockers, 4.00; 1 do., 2.50	6.50
4 doz. plates, 4.20; 4 dishes, .82	5.02
2 doz. cups and saucers	2.40
6 pitchers, .90; (6), 1.20; (6), 1.00	3.10
5 doz. butters, 1.75; glasses, 1.40	3.15
6¾ yds. carpet, 5.50; scoop, 1.00	6.50
2 doz. bowls, 2.00; 3 rugs, 6.50	8.50
3 kettles, 1.00; strainers, .36	1.36
6 pans, 1.26; saucepan, .25	1.51
Galv. cups, .50; coal-hod, .35	.85
1 pail, .50; dish-pan, .45	.95
1 cooker, .35; shades, 3.50	3.85
14 shades, 1.40; shears, .90	2.30
1 kettle	1.00
1 hod, .35	.35
1 gasoline stove	30.00
1 galv. slop-can	7.00
	2,823.73
2 oils (set up)	10.00
Chapel furniture	100.00
Pictures	120.00
Piano, "Weber"	200.00
Organ, M. & H	50.00
Funk & Ogden bill	
Crockery & glasses	346.65
8 Hardy furniture	7.50
3 dormitory furniture	24.00
Gas & elect. fixtures	200.00
Books in library	300.00
Chemicals and furniture in laboratory	200.00
Gymnas. fixtures, Id. lockers	100.00
Quartermaster supplies	100.00
Provision in store-room	155.84
Coal	10.00
14 pair- blankets, (11), 36.00; (1), 8.00; (2), 8.00	52.00
21 comforters	32.25
8 bed-spreads	20.00
3 pr-. hemstitch pillow-cases	3.00
24 pr-. do	9.60

2 stand lamps	5.00
2 toilet-sets	8.50
90 6/4 bed sheets, .25	22.50
36 10/4 bed sheets, .40	14.40
48 Turk. towels	14.40
8 pr-. pillows, (4), 14.00; (4), 10.00	24.00
35 pr-. pillows for 1/2 beds, 1.25	43.75
6 doz. towels	18.00
4 doz. towels	6.00
10 lin. table-cloths	30.00
8 doz. napkins	14.00
Am't forward	5,065.12
2 doz. damask towels	6.00
2 doz. wiping towels	2.00
2 tapestry table-covers	4.50
3 pr-. lace curtains	9.00
1 pr. tap. do	9.00
1 7-ft. pole & fixtures	1.50

Goods purchased by Rev. J. Hewitt:

Lincoln Carpet Co.	121.72
Lincoln Carpet Co.	154.68
Lincoln Carpet Co.	56.35
	26.10
	18.35
	88.93
	3.60
	23.72
	36.50
	48.45
	5.00
	13.21
	1.26
	4.50
9 3 clocks (1), 12.00; (1), 5.00; (1), 1.50	18.50
1 letter-press	4.50
	$5,722.49

Indorsed: District court, Lancaster Co., Neb. Grand View Building Ass'n *v.* Northern Assurance Co. Petition. Clerk's office, district court. Filed Aug. 30, 1898. Sam. E. Low, clerk district court.

Summons.

STATE OF NEBRASKA, } ss:
Lancaster County, }

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify The Northern Assurance Company of London, defendants, that *they* have been sued by Grand View Building Association, plaintiff, in the district court of the third judicial district in and for said county of Lancaster, and that unless it answer by the 3rd day of October, A. D. 1898, the petition of The Grand View Building Ass'n, plaintiff, filed against it in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 12th day of September, A. D. 1898.

Witness my hand and seal of said court, at Lincoln, this 30th day of August, A. D. 1898.

[SEAL.]

SAM. E. LOW, *Clerk,*
By J. H. MALLALIEU, *Deputy.*

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I hereby certify that on the 30th day of August, 1898, I served the within writ of summons on the within-named The Northern Assurance Company of London by delivering in person to A. D. Borgelt, attorney, for service a true and certified copy of the same, with all indorsements thereon; all done in Lancaster county, Nebraska, as required by law.

JOHN J. TROMPEN, *Sheriff,*
By F. M. WOODWARD, *Deputy.*

Fees.

Service and return	$ .50
Copy	.25
Mileage	.10
Total	.85

Indorsed: Summons. District court, Lancaster county. Doc. 23, page 265. Grand View Building Ass'n, plaintiff, *vs.*
10 Northern Assurance Co., defendant. If defendant fail to appear and answer the plaintiff will take judgment for $2,500, together with interest thereon from July 26, 1898, and costs of suit. Attest: Sam. E. Low, clerk, by J. H. Mallalieu, deputy. Returnable Sep. 12, 1898. H. F. Rose. Received Aug. 30, 1898. John J. Trompen, sheriff. Clerk's office, district court. Filed Sep. 1, 1898. Sam. E. Low, clerk district court.

Petition for Removal.

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

Petition for removal to the circuit court of the United States for the district of Nebraska.

Your petitioner The Northern Assurance Company of London, England, respectfully shows to this honorable court that it is the defendant in the above-entitled action which is of a civil nature and that the matter and amount in dispute in this cause exceeds the sum or value of $2,000 exclusive of interest and costs. That the controversy herein is between citizens of different nations. That the plaintiff The Grand View Building Association was at the time of the commencement of this suit and still is a corporation created under the laws of Nebraska, transacting its business within the State of Nebraska. That the defendant is a corporation created under the laws of the Kingdom of Great Britain and Ireland, with its general western department managed from the city of Chicago, Illinois, and is a non-resident of the State of Nebraska. And your petitioner desires to remove this suit before the trial thereof into the circuit court of the United States to be held in the district of Nebraska. And your petitioner offers herewith good and sufficient surety for its entering in said court on the first day of its next session a copy of the record in this cause and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted and that an order may be entered removing this cause to the circuit court of the United States for the district of Nebraska, and that no further proceedings may be had herein. And we will ever pray.

THE NORTHERN ASSURANCE COMPANY
OF LONDON, ENGLAND,
By GREENE & BRECKENRIDGE, *Its Attorneys.*

11 STATE OF NEBRASKA, *Douglas County,* } ss:

R. W. Breckenridge being duly sworn says he is one of the attorneys for the petitioner named in the foregoing petition for removal; that said petitioner is a corporation and affiant is authorized to verify said petition; and that the facts therein stated are true as affiant believes.

Further affiant saith not.

R. W. BRECKENRIDGE.

Subscribed in my presence and sworn to before me this 19th day of September, 1898.

[SEAL.] CHAS. V. MILES,
Notary Public.

Indorsed: Docket 23, No. 265. District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Petition for removal to the circuit court of the United States for the district of Neb. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant. } 23, 265.

Answer.

Comes now the defendant, The Northern Assurance Company of London, England, and answering the petition of the plaintiff herein, says:

It admits the allegations contained in the first paragraph of the plaintiff's petition.

Defendant admits that on the 31st day December, 1896, plaintiff was the owner of a certain property mentioned and described in the second paragraph of said petition which on the said day was insured by the defendant as stated in said petition.

Defendant admits that on June 1, 1898, the property described in the policy of insurance written by the defendant was burned, but denies that at said time the said policy was in full force, and alleges that said policy was not then in force.

Defendant denies specifically the allegations of the fourth paragraph of said petition.

12 Defendant admits that within 60 days from the date of said fire the plaintiff forwarded to this defendant what is denominated proofs of loss, the receipt of which so-called proofs of loss the defendant acknowledged, stating that it held same subject to the order of the plaintiff.

Defendant admits that at the date of said fire the plaintiff was the owner of the property which was burned, but denies that it was of the value stated in the 6th paragraph of the petition.

Defendant denies the allegations of the seventh paragraph of the petition, but admits that it denies liability.

Defendant denies the allegations of the 8th paragraph and further denies that there is anything due from the defendant to the plaintiff.

Further answering, this defendant alleges that the policy of insurance which it issued to the plaintiff on December 31, 1896, contained the following provision:

"This entire policy, unless otherwise provided by agreement in-

dorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy."

The defendant further says that its policy in question was issued to the plaintiff with the express statement therein made that it was issued "in consideration of the stipulations" therein named and of a certain amount of premium paid therefor. And said policy, besides the provisions above quoted, contains the following stipulation and condition:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

13 This defendant says that notwithstanding the stipulations, provisions and agreements above set forth and without the consent of the defendant endorsed upon said policy in writing and without the knowledge of the defendant, the plaintiff obtained a policy of insurance upon the property covered by the policy issued by this defendant in the sum of $1,500 in the Firemen's Fund Insurance Company.

Defendant says that the property upon which it issued its policy in the sum of $2,500 was represented by the plaintiff to the defendant to be of the value of $3,500.

The defendant alleges that by reason of the additional insurance upon said property not consented to in writing endorsed upon the policy of defendant and not in fact known to the defendant, the policy written by the defendant upon the plaintiff's property was at the date of the fire which damaged or destroyed the plaintiff's property wholly void, and was and has been void from the date of such additional insurance.

Defendant further says that on the 5th day of August, 1898, the defendant tendered to the plaintiff in current funds the sum of $33.75, the amount of the premium paid by the plaintiff upon the policy in question, and now brings into court and tenders to the plaintiff the said sum of $33.75 with interest at the rate of 7 % from Dec. 31st, 1896.

Wherefore, this defendant prays that judgment may be rendered against it for said sum of $33.75 with interest from Dec. 31st, 1896, with the costs of suit up to the filing of this answer, and no more.

GREENE & BRECKENRIDGE,
Attorneys for Defendant.

STATE OF NEBRASKA, } ss:
Douglas County, }

R. W. Breckenridge, being duly sworn, says he is one of the attorneys for the defendant in the foregoing action named; that said defendant is a corporation, hence affiant makes this verification that the facts stated in the foregoing answer are true as he believes.

R. W. BRECKENRIDGE.

Subscribed in my presence and sworn to before me this 19th day of September, 1898.

[SEAL.]

CHARLES V. MILES,
Notary Public.

Indorsed: Docket 23, No. 265. District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Answer. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

14 *Bond for Removal.*

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff, *vs.* THE NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant. } Bond for Removal.

Know all men by these presents that I am holden and stand firmly bound unto Grand View Building Association in the penal sum of five hundred dollars for the payment whereof well and truly to be made unto the said Grand View Building Association, its successors and assigns, I bind myself, my heirs, representatives and assigns jointly and firmly by these presents;

Upon condition, nevertheless, that whereas the Northern Assurance Company, of London, England, has filed its petition in the district court of Lancaster county, Nebraska, for the removal of a certain cause therein pending wherein said Grand View Building Association is plaintiff and The Northern Assurance Company of London, England, is defendant, to the circuit court of the United States for the district of Nebraska.

Now if the said The Northern Assurance Company of London, England, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in such suit and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof, I have hereunto set my hand and seal this 19th day of September, 1898.

FREDERICK H. DAVIS.

I hereby approve the foregoing bond for removal and surety.

ALBERT J. CORNISH,
Judge of the District Court, Lancaster County, Nebraska.

Indorsed: District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Bond for removal. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

Journal Entry.

That on the 18th day of July, A. D. 1898 (that being the 57th juridical day of the September, A. D. 1898 term of said court)
15 were had and done the following proceedings, as appears upon Court Journal "30" at page "694," to wit:

It is hereby ordered that all causes, matters and motions now pending in this court and not otherwise disposed of be, and the same hereby are continued until the next term of this court.

The May term of this district court was begun on the 2nd day of May, A. D. 1898, and continued from day to day and from time to time, by regular adjournment, until this 8th day of July, A. D. 1898, and now is adjourned without day.

Order.

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

This cause came on for hearing on the petition of the Northern Assurance Company of London, England, for the removal of the same to the circuit court of the United States for the district of Nebraska. On consideration whereof the court finds:

That said action is of a civil nature, and that the amount in dispute exceeds the sum of two thousand dollars, exclusive of interest and costs; that the plaintiff is a corporation created under the laws of the State of Nebraska, and doing business therein; that the defendant is a corporation created under the laws of the Kingdom of Great Britain and is non-resident of the State of Nebraska.

The petitioner having offered a good and sufficient surety for its entering into said court and for paying all costs that may be awarded, if said court shall hold that such suit was wrongfully or improperly removed thereto; the said bond being approved, the said cause is ordered removed to the said circuit court of the United States in and for the district of Nebraska.

ALBERT J. CORNISH,
Judge District Court.

Dated Lincoln, Neb., Sept. 29th, 1898.

Indorsed: 23,265. Grand View Building Ass'n *vs.* Northern Assurance Company. Order for removal. Clerk's office, district court. Filed Sep. 29, 1898. Sam. E. Low, clerk district court.

16 *Certificate.*

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, Sam. E. Low, clerk of the district court, third judicial district of Nebraska, in and for the county of Lancaster, do hereby certify that the above and foregoing is a true and correct copy of the petition, summons; petition for removal; answer; bond for removal, order of court, with endorsements on each, together with proceedings of trial, adjournment *sine die* of our said court, in a cause therein wherein The Grand View Building Association is plaintiff and The Northern Assurance Company is defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as clerk aforesaid.

In witness whereof I have hereunto set my hand officially and attached the seal of said court at Lincoln, this 29 day of Sept., A. D. 1898.

[SEAL.] SAM. E. LOW, *Clerk D. C.*,
By J. H. MALLALIEU, *Deputy.*

[10-cent internal-revenue stamp.]

Trans. fee, $9.00.

Transcript endorsed: Filed Sep. 30, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 5th day of October, 1898, reply was filed in said case, which said reply is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Reply.

The plaintiff for reply to the answer of defendant herein denies that it procured a policy of insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant to plaintiff and without the knowledge of defendant; and alleges that the amount of insurance carried on said property by plaintiff was not in any manner increased after issuing of defendant's policy, or during the term of insurance under defendant's policy. The policy referred to in said answer, of $1,500.00 in the Firemen's Fund Insurance Company, was, on the con-

trary, subsisting at and prior to the issuance by defend-
17 ant to plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy, on the same property covered by defendant's policy, was personally well known to A. D. Borgelt, defendant's recording agent, who wrote said policy and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire-insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and issuance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt, the fact of such subsisting insurance of $1,500.00; and said Borgelt as such agent, with full knowledge of said fact, accepted the risk and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the said subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received the premium therefor. By all the aforesaid several acts, the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by indorsement on the policy; and defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy.

Plaintiff denies that it ever represented to defendant that the property described in and insured by said policy of insurance was of the value of $3,500.00.

Wherefore plaintiff prays for judgment as in its petition prayed.

H. F. ROSE,
Attorney for Plaintiff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

H. J. Walsh, being first duly sworn, says on oath plaintiff is a corporation, and I am its president, and I believe the facts set forth in the foregoing reply to be true.

H. J. WALSH.

18 Subscribed in my presence and sworn to before me this first day of October, A. D. 1898.

[SEAL.] WILLARD HAMMOND,
Notary Public.

Indorsed: Filed Oct. 5, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 19th day of December, 1898, the following proceedings were had and done in said case, as appear of record in Journal — of said court, to wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON. } 285, "T."

Jury Trial Begun.

This cause being regularly called for trial, plaintiff appears, by its attorney, H. F. Rose, Esq., and the defendant, by R. W. Breckenridge, Esq. Thereupon, upon motion of plaintiff's said attorney, it is ordered that a jury come, to wit:

Amos Weller,	C. G. Vanness,
J. E. Mendenhall,	W. R. Fuller,
H. Timme,	J. R. Kelsey,
O. J. Davis,	N. H. Meeker,
J. B. Lyons,	Carr Oxford,
E. P. Brewster,	S. D. Jolly,

twelve good and lawful men who are duly sworn and empaneled to try the issues joined herein; thereupon testimony is heard on behalf of the plaintiff, and the trial of said cause not being concluded at the hour of adjournment, it is

Ordered that further proceedings herein be, and they hereby are, postponed until tomorrow morning at 9 o'clock.

Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 20th day of December, 1898, the following proceedings were had and done in said case, as appear of record in Journal — of said court, to wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY, ETC. } 285, "T."

Record of Jury Trial; Special Verdict.

This day again come the parties herein by their respective attorneys, also the jury heretofore duly empanelled and sworn to try the issues joined herein, and after hearing further evidence in said cause, the arguments of said attorneys, and the charge of the court,
19 the jury retire to consider of their verdict, and after due consultation concerning the same, and being fully advised in the premises, they find, and return into court by their foreman, their verdict, which is in words and figures following, to wit:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

The jury are instructed to find upon the following questions:

Finding 1. Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?

Answer. Yes.

Finding 2. Was the property covered by said policy of insurance burned on or about June 1, 1898?

Answer Yes.

Finding 3. Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?

Answer. Yes.

Finding 4. Did the policy issued to the plaintiff by the defendant contain the following provisions:

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And did said policy also contain the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed thereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached?"

Answer. Yes.

20 Finding 5. Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. D. Borgelt know when the policy in the de-

fendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

Finding 8. What was the actual cash value of the property covered by the policy in suit which was destroyed by fire June 1, 1898?

Ans. ($4,140.00) four thousand one hundred forty dollars.

Finding 9. Was consent to concurrent insurance of $1,500 endorsed on the policy in suit?

Answer. No.

Finding 10. Did defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?

Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff.

Finding 11. Did the policy sued on contain the following provision: "This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance."

Answer. Yes.

Finding 12. What was the whole amount of insurance on said property at the time of the loss?

Answer. $4,000.00.

W. H. MEEKER, *Foreman.*

21 Original verdict endorsed: Filed Dec. 20, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 22nd day of December, 1898, plaintiff's motion for judgment on the verdict was filed in said case, which said motion is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Motion for Judgment on the Verdict.

1. Plaintiff moves the court for judgment herein in its favor against defendant for the sum of $2,500.00, and interest thereon from commencement of suit, August 30, 1898, and costs, because the facts found by the jury conclusively establish plaintiff's right to recover of defendant the full sum prayed for in the petition.

2. Defendant, by issuing its policy and receiving the premium

therefor, with knowledge of the existing insurance of fifteen hundred dollars ($1,500.00) in Firemen's Fund Insurance Company, communicated beforehand by assured to A. D. Borgelt, its recording agent, who issued the policy, as by the jury specially found, waived the conditions of said policy set forth in the answer, and is estopped thereby to claim a forfeiture or assert the invalidity of said policy by virtue of said conditions.

HALLECK F. ROSE,
Attorney for Plaintiff.

Indorsed: Filed December 22, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 22nd day of December, 1898, defendant's motion for judgment on findings was filed in said case, which said motion is in words and figures following, to wit:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

Motion for Judgment on Findings.

Comes now the defendant and moves the court to render judgment in favor of defendant upon the findings of the jury returned herein.

GREENE & BRECKENRIDGE,
Attorneys for Defendant.

Indorsed: Filed Dec. 22, 1898. Oscar B. Hillis, clerk.

22 Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 14th day of January, 1899, the following proceedings were had and done in said case as appear of record in Journal — of said court, to wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY. } 285, "T."

Motion Overruled; Judgment.

This cause having heretofore been tried before a jury and a special verdict having been duly rendered and filed herein, and plaintiff having heretofore to wit, on the 22nd day of December, filed its motion for judgment upon said verdict, in its favor and against the defendant; and the defendant, having on the same day filed its motion for judgment upon said verdict, in its favor, and said motions having been fully argued by the attorneys for the respective parties, duly submitted and by the court taken under advisement,

Now, after due consideration thereof, and being fully advised in the premises, it is by the court

Ordered, that the motion of defendant for a judgment in its favor upon said verdict be and it hereby is overruled and denied.

To which order the defendant excepted.

And it is further ordered by the court that plaintiff's motion for judgment in its favor be and it hereby is sustained.

Thereupon, it is considered, ordered and adjudged by the court that the plaintiff, The Grand View Building Asssociation do have and recover of and from the defendant, The Northern Assurance Company, of London, England, the sum of twenty-five hundred dollars ($2,500.00), with interest thereon at 7% per annum, from September 26th, 1898, besides its costs and disbursements herein taxed at the sum of $45.75, and that it have execution therefor.

And upon motion of defendant's attorneys, it is by the court ordered that defendant be and it hereby is given forty days from and after this date within which to prepare and settle a bill of exceptions.

Thereupon, afterwards, to wit: on the 27th day of January, 1899, bill of costs taxed in favor of Grand View Building Ass'n was filed in said case, which said bill of costs is in words and figures following, to wit:

23 In the Circuit Court of the United States for the District of Nebraska.

Bill of Costs Taxed in Favor of Grand View Building Ass'n in the Case of—

GRAND VIEW BUILDING ASS'N
vs.
THE NORTHERN ASSURANCE CO. } No. 285, Doc. "T."

Clerk's fees (for items see appearance docket)	$24.90
Witness fees:	
Name, Burt W. Richards, 2 days, 110 miles	8.50
" H. J. Walsh, 2 days, 110 miles	8.50
" Mrs. Ralston, 1 day, 5 miles	1.75
" C. H. Rudge, 1 day, 110 miles	7.00
Attorney's fees, *i. e.*, docket fee, $20.00	20.00
Total	$45.75

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for said district of Nebraska, do hereby certify that the above and foregoing is a true statement of the costs taxed and allowed in favor of Grand View Building Ass'n in the above-entitled case, and that the same are just and legal as I verily believe.

Witness my hand and the seal of said court this 27th day of Jan'y, 1899.

[SEAL.]

OSCAR B. HILLIS, *Clerk*,
By R. C. HOYT, *Deputy*.

Indorsed: Filed Jan. 27, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 2nd day of March, 1899, bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

United States Circuit Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause in the circuit court of the United States for the district of Nebraska, before the Honorable William H. Munger, and a jury duly impaneled therein, at the November term of said court, on the 19th day of De-
24 cember, 1898, the plaintiff to maintain the issues upon its part offered as a witness H. J. WALSH, who being duly sworn testified that he is president of the Grand View Building Association and was such officer of the plaintiff at the time the policy in suit was issued, and acted for and in behalf of the plaintiff in the matter of procuring the issuance of the policy. He dealt with respect thereto with Mr. Borgelt, the agent of the defendant who has an office in the Walsh & Putnam block, in Lincoln, Nebraska. Previous to the date of the policy in suit, witness had conversations with Borgelt both in the office of witness and in Borgelt's office regarding the insurance. The defendant had a previous policy on the water works and power-house of the plaintiff, but Borgelt informed witness that the defendant objected to the risk and asked Borgelt to cancel the policy, and witness, wishing to favor Borgelt as he was a tenant of witness, told Borgelt that there was but $1,500.00 insurance on the furniture and it would carry $4,000.00. Witness understood from his book-keeper that there was at that time about $4,800.00 worth of furniture in the building and Borgelt thought he could write the $2,500.00 additional insurance on the furniture and said he would do so. Witness did not procure any further or additional insurance on the subject of insurance covered by the policy in suit after the date of its issuance. Whatever insurance there was on the property was specified at the time this policy was issued and there was no other or different insurance than that which witness has referred to as having been mentioned to Mr. Borgelt. Witness requested Burt Richards, an insurance agent who had the other policy, to confer with Borgelt about the insurance before it was written in behalf of plaintiff, and witness thinks that Richards was present at some time when he had a conversation

with Borgelt about the matter, and Richards and Borgelt conferred about making their policies concurrent.

The policy in suit was delivered to witness by Mr. Borgelt at the office of witness. The premium was paid to Mr. Borgelt. When the policy was delivered witness put it in his safe. Witness never looked at the policy; he supposed it was like all of his policies and presumed the endorsement permitting concurrent insurance was on the policy and did not know for two or three weeks after the fire but that the policy was all right. The witness gave in detail the various items of personal property which were covered by the policy, and estimated its value at $5,722.49. Witness forwarded an inventory of the goods destroyed, an exact copy of which is attached to the petition in the suit, by registered mail to Mr. Lermit, the manager of the defendant company in Chicago, and received in reply thereto the following letter:

25 "CHICAGO, *Aug.* 2, 1898.

Grand View Building Association, H. J. Walsh, president, Lincoln, Nebraska.

DEAR SIRS: We have your favor of the 26th ult. enclosing to us what purports to be proof of loss, making claim under our policy No. 310,024 of Lincoln, Neb., agency, and issued to you for $2,500 on household furniture, etc., while contained in the three-story brick and stone building on lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st day of June, 1898, and beg to say in reply that your sworn statement therein advises us that you had other insurance on this same property to the amount of $1,500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11, 12, and 13 of the printed conditions of our policy, to which we beg to refer you.

We, therefore, regret to have to advise you, and do now hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310,024, held by you, holding that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance above referred to. Our agents at Lincoln have been instructed to return to you the full premium paid them by you, namely $33.75, at once.

We further beg to say that we are holding your purported proofs of loss, subject to your order.

Yours very truly, G. H. LERMIT, *Manager*,
By A. E. CLOUGH, *Att'y.*"

The policy was signed by Borgelt & Beasley, and the Borgelt mentioned by witness is of that firm.

The plaintiff thereupon offered the original policy in evidence, which was received without objection, and is as follows:

(Here follows policy marked pp. 26 and 27.)

29 Thereupon the plaintiff to further maintain the issues on its part, produced as a witness BURT W. RICHARDS, who, being duly sworn, testified that he lives in Lincoln, and knows Mr. Walsh and Mr. Borgelt. Witness had conversations with Mr. Walsh and Mr. Borgelt regarding the matter of insurance on furniture in the Worthington academy owned by the plaintiff during the month of December, 1896, and prior to December 31st. Witness was requested by Mr. Walsh to see Mr. Borgelt, and pursuant to that request, saw him. The conversation the witness had with Borgelt was in Borgelt's office. Mr. Walsh had asked witness to take a certain policy of the Northern Assurance Company, covering the power plant to Mr. Borgelt, and have Borgelt rewrite it upon the furniture of the plaintiff which owned and operated the Worthington Military Academy and for the reason that the Northern Assurance Company had declined to carry the power plant, and Mr. Walsh had made arrangements with witness to write the insurance on the power plant; witness took the policy in the defendant's company, covering the power plant, and went across to Mr. Walsh's office and laid it on his desk, and said to Borgelt, "Mr. Walsh has decided to let you place this policy on the furniture in the Worthington Military Academy, and I will write the power plant myself, inasmuch as your company won't carry it; so you write this up on the furniture concurrent with our policy of $1,500 on the furniture now." The $1,500 policy referred to was in the Firemen's Fund and witness had been the solicitor that had obtained the order for that $1,500 policy.

On cross-examination the witness testified that the conversation referred to took place about the same date when the policy in the defendant company was written and before the delivery of the policy in suit.

Thereupon the plaintiff to further maintain the issues upon its part, called as a witness in its behalf Mrs. RALSTON, who, being duly sworn, testified that she was the matron of the Worthington Military Academy, and testified in detail concerning all items of property which were destroyed by fire, specifying the same items that are set forth at length in the inventory, a copy of which is attached to the petition in the case. The property had, most of it, been in use for a number of years.

Thereupon the plaintiff to further maintain the issues upon its part, called as a witness in its own behalf C. H. RUDGE, who, being duly sworn, testified that he is a member of the Rudge & Morse Company, engaged in the house-furnishing business at Lincoln, where he has been in business for twelve or thirteen years.

30 He knows the Worthington Military Academy and its president, Mr. Walsh; and his house furnished practically all of the furniture and fixtures, outside of the carpets and glassware, which fitted up the Worthington Military Academy owned by the Grand View Building Association. He has inspected the invoice attached to the original petition, and in his opinion, the items

thereon are of the reasonable value of seventy-five per cent. of the cost price, as stated in the inventory.

Thereupon the plaintiff rested, and the defendant to maintain the issues upon its part, produced as a witness A. D. BORGELT, who being duly sworn, testified that he is a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nebraska, and is a member of the firm of Borgelt & Beasley that wrote the policy in the Northern Assurance Company on the Grand View Building Association. At the time he wrote that policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit and the first time he knew of any other insurance was after the fire. Richards and the witness never had any conversation with regard to the writing of the policy in suit. The witness dealt with Mr. Walsh and Mr. Walsh didn't say anything to him about any other insurance. The witness recalls that there was a value placed upon the property that was to be covered by the $2,500 insurance, but he does not remember where he got it from. Witness is recording agent of the defendant in Lincoln and reports his business to Chicago.

On cross-examination the witness testified that he talked to Mr. Walsh about the policy in his office, having previously gone to Mr. Walsh's office to inform him of the cancellation of the other policy, and at that time he told Mr. Walsh that he would like to have him place other insurance with him, and that he would like to carry the risk covered by the policy in suit. Witness was at that time a tenant of Mr. Walsh's building, with an office on the same floor with Mr. Walsh. The policy in suit was written after the cancellation of the previous policy on the power-house of the Grand View Building Association. The power-house policy was not ordered by Mr. Walsh, but was ordered by Mr. Richards from the Farmers' and Merchants' Company, and the talk witness had with Mr. Richards was about the power-house policy. During the conversation between witness and Walsh, Walsh told witness he could have the insurance on the furniture. The policy was in the same amount and the premium was the same that was charged upon the power-house policy. Witness does not remember that Walsh said anything to him about having $1,500 on the furniture and that it would carry more, but he might have mentioned it.

31 On redirect examination the witness testified that he has no recollection of having known anything about the other insurance until after the fire.

It was stipulated that on August 4, 1898, the premium paid for the policy in suit in the sum of $33.75 was tendered to the plaintiff and that the plaintiff refused to take it.

It was further stipulated that the total amount of insurance upon the property at the time it was destroyed was $4,000.00.

Whereupon the defendant rested.

The defendant moved the court to strike out the evidence relative to and withdraw from the consideration of the jury, the items desig-

nated in the schedule attached to the petition, "Chemicals and furniture in laboratory," which motion was sustained.

The defendant moved the court to withdraw from the consideration of the jury and to instruct the jury not to consider the items following: "60 desks, $210.20; 27 seats, $152.80; 1 set of charts and globe, $160; gas and electric fixtures, $200; gymnasium fixtures and locker, $100;" also the various bills scheduled as purchased by Rev. A. Hewitt, not itemized, aggregating $602.37, which motion was overruled. Defendant excepted.

No further testimony was offered by either party, both parties rested, and the foregoing is all the testimony offered or given upon the trial of this case.

The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

Thereupon afterwards and after arguments of counsel, the court instructed the jury as follows:

Instructions to the Jury.

GENTLEMEN OF THE JURY:

As you have discovered during the progress of this trial, there are one or two legal questions involved, and the court has thought it advisable rather than to pass upon them with a hurried examination which, if the conclusion I should arrive at now should be afterwards found to be wrong would result in a retrial, to submit to you special findings for you to pass upon, and then the court can upon those findings render such a judgment as after more mature reflection and consideration of the legal questions involved shall seem to be right and proper.

32 Most of the questions submitted to you for answer there is no dispute about between the parties, and you are directed by the court to answer them in the manner in which they have been answered, in other words, as they are inserted.

They are as follows:

"(1.) Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?"

There is no dispute about that, so that is answered, "Yes."

"(2.) Was the property covered by said policy of insurance burned on or about June 1, 1898?"

There is no dispute about that so that is answered, "Yes."

"(3.) Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?"

There is no dispute about that and that is answered, "Yes."

"(4.) Did the policy issued to the plaintiff by the defendant contain the following provisions:

'This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.'

And did said policy also contain the following provision:

'This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached?'"

There is no dispute about that, so that is answered, "Yes."

"(5.) Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Fireman's Fund Insurance Company?"

There is no dispute about that and that is answered, "Yes."

"(6.) Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined; and did he issue the policy in question as such agent?"

There being no dispute about that, the proper answer that is written in is as follows:

33 "Answer. A. D. Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent."

"(7.) Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Fireman's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?"

That is a disputed proposition, so that you must answer that question. The word "answer" is written under the question, and you will write after the word "answer," either yes or no. That question is susceptible of being answered by the simple word yes or no.

"Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Fireman's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?" That is the first question which is disputed and which you are required to answer, and that can be answered by the simple answer yes or no.

"Finding 8. What was the actual cash value of the property

covered by the policy in suit which was destroyed by fire June 1, 1898?"

That is a disputed question and that is for you to determine what was the actual cash value at that time.

"(9.) Was consent to concurrent insurance of $1,500 endorsed on the policy in suit?"

There is no dispute about that so that is answered "No."

"(10.) Did defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?"

There is no dispute about that, so that is answered as follows:

"Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff."

"(11.) Did the policy sued on contain the following provision:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire
34 than the amount hereby insured shall bear to the whole insurance?"

There is no dispute about that and that is answered "Yes."

"(12.) What was the whole amount of insurance on said property at the time of the loss?"

There is no dispute about that and that is answered as follows:

"$4,000.00."

So you see there is no dispute except upon two of these propositions; the others are all answered; and you are to find upon these two propositions, the one as to whether or not the agent, Mr. Borgelt, knew of this previous insurance at the time of the issuing of this policy, and the other as to the actual cash value of the property destroyed.

The burden of proof rests upon the plaintiff to establish by a preponderance of the evidence these two propositions. By a preponderance of the testimony is not meant necessarily the greatest number of witnesses, but it is that evidence which is most convincing to your mind. If the evidence on the part of the plaintiff is more convincing, the truthfulness of it, than it is on the part of the defendant, then the preponderance of evidence is established. If it is not the most convincing, if the evidence is equally balanced to your minds that it is the same upon one side as it is upon the other, equally balanced, so as to leave an uncertainty, then the proof is not established by a preponderance of the testimony.

And the same way the burden is upon the plaintiff to establish by a preponderance of the evidence the value of the property.

Now, in determining the actual cash value of the property the parties provided in the policy how that was to be done, as follows:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured

to repair or replace the same with material of like kind and quality."

That is the manner in which they have agreed to determine what was the actual cash value, taking the property and deducting the proper amount for depreciation, and in no event is it to exceed what it would cost to replace the property in the same condition it was at the time of the fire and the loss.

35 Now, the credibility of the witnesses is a matter for you to determine. In determining the credibility, when you come to the testimony of any of the witnesses you are to take into consideration their demeanor upon the witness stand, their candor, the fairness with which they give their testimony, their interest or want of interest in the result of the suit, and all of these matters, the probability or improbability of their statement, all these are matters for you to consider in determining the credibility to be given to the testimony of the various witnesses.

I do not see how I can enlighten you further or say anything that would aid you in arriving at a correct conclusion on these two propositions left for your consideration. When you have agreed you will write in your answers and have your foreman sign above where I have written the word "foreman." The parties have consented that you may take this transcript of the record from the State court which contains here the list of the items. I have withdrawn from your consideration the item designated by pencil marks on each side, so you will have no difficulty in finding it.

It is the only one that is designated by pencil marks. It is the item of "chemicals and furniture in laboratory." That item is a matter you are not to take into consideration, as the court decides that it is not covered by the policy.

You can retire in charge of a bailiff.

On December 20, 1898, said jury returned their findings to the court as follows:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY, Defendant.

The jury are instructed to find upon the following questions:

Finding 1. Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?

Answer. Yes.

Finding 2. Was the property covered by said policy of insurance burned on or about June 1, 1898?

Answer. Yes.

Finding 3. Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?

Answer. Yes.

36 Finding 4. Did the policy issued to the plaintiff by the defendant contain the following provisions:

"This entire policy (—) otherwise provided by agreement endorsed thereon or added thereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And did said policy contain the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Answer. Yes.

Finding 5. Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

Finding 8. What was the actual cash value of the property covered by the policy in suit which was destroyed by fire June 1, 1898?

37 Answer. ($4,140.00) four thousand one hundred and forty dollars.

Finding 9. Was consent to concurrent insurance of $1,500 indorsed on the policy in suit?

Answer. No.

Finding 10. Did the plaintiff tender a return of the premium paid upon the policy in suit? If so, when and what amount?

Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff.

Finding 11. Did the policy sued on contain the following provision:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance."

Answer. Yes.

Finding 12. What was the whole amount of insurance on said property at the time of the loss?

Answer. $1,000.00.

N. H. MEEKER, *Foreman.*"

Whereupon afterwards and on December 22nd, 1898, the defendant moved for judgment in its favor upon the findings of the jury and on the same day the plaintiff moved for judgment in its favor upon the findings and special verdict of the jury; and thereupon afterwards and on January 14th, 1899, the motion of the plaintiff for judgment upon the findings of the jury aforesaid was sustained and the defendant excepted and the motion of defendant for judgment in its favor upon said findings was overruled and the defendant excepted thereto; and afterwards, on February 6th, 1899, the defendant by leave of court filed its petition for a new trial; and thereupon thereafter the said cause was submitted to the court for its ruling and judgment upon said defendant's motion to set aside the special findings, verdict and judgment therein.

It is stipulated by and between the parties hereto that the foregoing bill of exceptions contains all the evidence offered or given in said cause and is a true bill of exceptions and may be allowed by the court as such in this cause.

Feb'y 23, 1899.

HALLECK F. ROSE,
Attorney for Plaintiff.
GREENE & BRECKENRIDGE,
Attorneys for Defendant.

38 And now on this 25th day of February, 1899, the foregoing bill of exceptions is duly allowed by me and ordered to be made a part of the records in this cause.

W. H. MUNGER, *Judge.*

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon, afterwards, to wit: on the 2nd day of March, 1899, assignment of errors was filed in said case, which said assignment of errors is in words and figures following, to wit:

United States Circuit Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Now comes The Northern Assurance Company of London, the above-named defendant and plaintiff in error, and assigns the following errors in the record and proceedings in the above-entitled cause as follows:

1. The court erred in overruling the defendant's motion at the close of all evidence for an instruction to the jury to return a verdict in favor of defendant.
2. The court erred in overruling the motion of the defendant for judgment upon the findings of the jury.
3. The court erred in sustaining the motion of the plaintiff for judgment upon the findings of the jury.
4. The court erred in rendering judgment in favor of the plaintiff and against the defendant.

Wherefore, the defendant and plaintiff in error prays for a reversal of the said judgment and for such relief as it is of right entitled to have.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Attorneys for Defendant and Plaintiff in Error,
Northern Assurance Company of London.

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on said 2nd day of March, 1899, petition for writ of error and order allowing same was filed in said case, which said petition is in words and figures following, to wit:

39 United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Petition for Allowance of Writ of Error.

To the honorable judges of the circuit court of the United States for the district of Nebraska:

The defendant in the above-entitled cause, conceiving itself aggrieved and prejudiced in various orders and rulings of the court in said cause, and alleging divers grievous and prejudicial errors of the court in making such orders and rulings, files herewith an assignment of the errors complained of and prays for an allowance of a writ of error in said cause to the United States circuit court of appeals for the eighth circuit, and that a transcript of the records and proceedings, duly authenticated, be sent to the said court.

NORTHERN ASSURANCE COMPANY
OF LONDON,
By CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Its Attorneys.

On to wit, this 25th day of February, 1899, it is ordered that a writ of error be allowed as prayed for and supersedeas bond is fixed at the sum of $3,500.00 *dollars.*

W. H. MUNGER,
United States District Judge.

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards *to wit, on the 2nd day of March*, 1899, bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents, that we, Northern Assurance Company of London and Frederick H. Davis, are held and firmly bound unto Grand View Building Association, in the full and just sum of thirty-five hundred dollars, to be paid to the said Grand View Building Association, its successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this second day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the November term A. D. 1898, of the circuit court of the United States for the district of Nebraska, in a suit depending in said court between Grand View Building Association, plaintiff, and Northern Assurance Company of London, defendant, judgment was rendered against the said Northern
40 Assurance Company of London, and the said Northern Assurance Company of London, *has* obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Grand View Building Association citing and admonishing it to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now the condition of the above obligation is such, that if the said Northern Assurance Company of London shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN ASSURANCE COMPANY
OF LONDON, [SEAL.]
By GREENE & BRECKENRIDGE, [SEAL.]
Its Attorneys.
FREDERICK H. DAVIS. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
WM. H. MUNGER, *Judge.*

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk. No. 285, "T." United States circuit court, district of Nebraska. Grand

View Building Association *vs.* Northern Assurance Company of London. Bond, $3,500.00.

Thereupon afterwards, to wit, on the 2nd day of March, 1899, a writ of error was issued and filed in said case, and a certified copy of such writ of error filed and lodged in the clerk's office, by the plaintiff in error for the defendant in error, and a citation duly signed and returned and filed on the 2nd day of March, 1899, with proof of service endorsed thereon. The following are the originals:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1898, thereof, between Grand View Building Association and Northern Assurance Company of London, a manifest error hath happened, to the great damage of the said Northern Assurance Company of London, England, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
41 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 26th day of April, 1899, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine. Issued at office in the city of Omaha, Nebraska, with the seal of the circuit court of the United States for the district of Nebraska, dated as aforesaid.

Seal United States Circuit Court, District of Nebraska.

OSCAR B. HILLIS,
Clerk Circuit Court United States, District of Nebraska.

Allowed by—
W. H. MUNGER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court, District of Nebraska.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of Omaha, this 31st day of March, A. D. 1899.

OSCAR B. HILLIS,
Clerk of said Court.

No. 285, "T." United States circuit court, district of Nebraska. Grand View Building Association *vs.* Northern Assurance Company. Writ of error to the circuit court of the United States for the district of Nebraska. Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

42 The United States of America to Grand View Building Association, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Northern Assurance Company, of London, (England), is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Munger, judge of the circuit court of the United States for the district of Nebraska, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

WM. H. MUNGER,
United States District Judge for the District of Nebraska.

I hereby accept service of the within citation this 27th day of February, 1899, for and on behalf of Grand View Building Association.

HALLECK F. ROSE,
Attorney for Plaintiff and Defendant in Error.

No. 285, T. United States circuit court, district of Nebraska. Grand View Building Association *vs.* Northern Assurance Company of London. Citation. Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA, *District of Nebraska*, } ss:

Pursuant to the foregoing writ of error and in obedience thereto, I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing pages from one (1) to fifty-nine (59) inclusive, contain true and faithful transcripts of all the pleadings, process and proceedings of record and on file in said court, in the case of Grand View Building Association *vs.* The Northern Assurance Company of London, England, No. 285, docket "T," and that copies of the writ of error and citation duly certified have been lodged and remain in my said office as such clerk.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said circuit court, at Omaha in said district, this 31st day of March, A. D. 1899.

OSCAR B. HILLIS, *Clerk.*

[Cancelled 10-c. U. S. rev. stamp.]

Filed Apr. 10, 1899.

JOHN D. JORDAN, *Clerk.*

43 (*Appearance for Plaintiff in Error.*)

And on the eleventh day of April, A. D. 1899, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE CO., Plaintiff in Error, *vs.* GRAND VIEW BUILDING ASSOCIATION. } No. 1248. December Term, 1898.

The clerk will enter *my* appearance as counsel for the plaintiff in error.

CHARLES J. GREENE.
RALPH W. BRECKENRIDGE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1248. Northern Assurance Company, plaintiff in error, *vs.* Grand View Building Association. Appearance. Filed Apr. 11, 1899. John D. Jordan, clerk. Charles J. Greene, Ralph W. Breckenridge, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the twenty-ninth day of May, A. D., 1899, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error, *vs.* GRAND VIEW BUILDING ASSOCIATION.	No. 1248. May Term, 1899.

The clerk will enter my appearance as counsel for the defendant in error.

HALLECK F. ROSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1248. Northern Assurance Co. of London, England, plaintiff in error, *vs.* Grand View Building Association. Appearance. Filed May 29, 1899. John D. Jordan, clerk. Halleck F. Rose, counsel for def't in error.

44 (*Stipulation as to Order Overruling Petition for New Trial.*)

And on the thirtieth day of June, A. D. 1899, a stipulation as to order overruling petition for new trial was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error, *v.* GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.	No. 1248. Stipulation.

Come now the parties hereto and stipulate that the petition for a new trial filed with leave of court on February 6, 1899, and referred to on page 37 of the printed record herein, was duly overruled, and both parties hereto waive any point which either might make upon the printed record as it stands that the judgment herein sought to be reversed is not shown by the printed record to be final because of the pendency of the petition for a new trial.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, *Plaintiff in Error,*
By GREENE & BRECKENRIDGE, *Its Attorneys.*
GRAND VIEW BUILDING ASSOCIATION, *Defendant in Error,*
By HALLECK F. ROSE, *Its Attorney.*

(Endorsed:) No. 1248. United States circuit court of appeals, eighth circuit. Northern Assurance Company of London, England, pl'ff in error, *v.* Grand View Building Association, def't in error. Stipulation as to order overruling petition for new trial. Filed Jun- 30, 1899. John D. Jordan, clerk. Greene & Breckenridge, attorneys for pl'ff.

(*Order of Submission.*)

And on the eleventh day of December, A. D. 1899, in the
45 record of the proceedings of said circuit court of appeals, is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *December* 11, 1899.

THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,
vs.
THE GRAND VIEW BUILDING ASSOCIATION.

In error to the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ralph W. Breckenridge in behalf of the plaintiff in error, continued by Mr. Halleck F. Rose for the defendant in error, and concluded by Mr. Ralph W. Breckenridge for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-sixth day of March, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

46 United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error,
vs.
GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.
No. 1248. December Term, A. D. 1899.

In error to the circuit court of the United States for the district of Nebraska.

Mr. Ralph W. Breckenridge (Mr. Charles J. Greene was with him on the brief) for plaintiff in error.

Mr. Halleck F. Rose for the defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

THAYER, circuit judge, delivered the opinion of the court:

The general question which arises in this case is whether an insurance company should be permitted to take advantage of a con-

dition contained in one of its policies, to avoid the payment of a loss that has been sustained thereunder, when it appears that the fact rendering the policy void by the terms of the condition which is pleaded as a defense was an existent fact known to the insurer at the time it issued its policy and accepted the premium, which for that reason rendered the policy void, if at all, from the moment it was delivered. The question arises in this way. The Northern Assurance Company of London, England, the plaintiff in error, insured certain household and kitchen furniture belonging to The Grand View Building Association, the defendant in error, that was situated in a certain building in the city of Lincoln, Nebraska. The policy which it issued contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

47 At the time the policy in suit was executed the insured property was covered to the amount of $1,500.00 by a policy issued by the Firemen's Fund Insurance Company. A jury found that an agent of the plaintiff in error by the name of A. D. Borgelt, who had authority to make contracts of insurance in its behalf and to countersign and issue its policies and collect premiums thereon, and who solicited the policy in suit—had knowledge of the existence of the policy issued by the Firemen's Fund Insurance Company at the time he issued the policy in suit, but no indorsement appears to have been made upon the policy in suit relative to the existence of the prior policy. A fire having occurred by which the insured property was totally destroyed and an action having been brought against the plaintiff in error, which was the defendant below, to recover the amount of the loss, it pleaded the aforesaid provisions of its policy and the existence of the prior insurance as a defense to the action. The verdict below was special and on the state of facts heretofore recited, which were either found by the jury or disclosed by the record, the trial court rendered a judgment against the insurer which it seeks to reverse.

The general question stated at the outset of this opinion has been answered in the negative in many well-considered decisions. It was

so answered by this court in Firemen's Fund Insurance Co. *v.* Norwood, 32 U. S. App., 490; 69 Fed. Rep., 71, and the same conclusion has been reached in other circuits. Thus, in the case of London & Lancashire Fire Ins. Co. *v.* Fischer, — U. S. App., —; 34 C. C. A., 503; 92 Fed. Rep., 500 (decided by the circuit court of appeals of the sixth circuit), it was said to be "well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or incumbrances without the consent of the company in writing on the face of the policy, if it appears that when the agent of the company with authority to deliver or withhold policies delivered the policy in question he then knew of the existence of the other insurance or the incumbrance." The same doctrine was enforced by the circuit court of appeals for the ninth circuit in the case of McElroy *v.* British American Assurance Co. of Toronto, Canada, — U. S. App. —; 36 C. C. A., 615; 94 Fed. Rep., 990, wherein it appeared that an agent of an insurance company had issued a policy with knowledge of an existing incumbrance on the insured property and had failed to endorse the fact on the policy, although it contained a provision in substance that it should be void if there was a mortgage on the property unless the consent of the insurer thereto was shown by a written endorsement on its policy. It was also held by the circuit court of appeals for the fourth circuit in the case of Glover *v.* National Fire Insurance Company of Baltimore, — U. S. App., —; 30 C. C. A., 95; 85 Fed. Rep., 125, that the fact that the insured property was erroneously described as a "dwelling-house" when it should have been described as a "Keely Institute," which would have rendered it a more hazardous risk—would not avail the insurer as a defense to its policy when a loss had occurred, it appearing that the agent of the insurance company had knowledge of the misdescription when he solicited the risk and issued the policy. And in Putnam *v.* Commonwealth Ins. Co., 4 Fed. Rep., 753, Judge Blatchford held, after a careful review of the authorities, that an insurance company could not take advantage of a provision in its policy rendering it void if there was other concurrent insurance not
48 endorsed thereon, when it was proven that its soliciting agent had knowledge of existing insurance on the insured property to the amount of $6,000 at the time he issued its policy and only endorsed thereon permission to carry other concurrent insurance to the amount of $3,000.00.

The point now under consideration has been adjudicated so frequently that it is doubtless unnecessary to do more than refer to the cases already mentioned and the authorities therein cited. We will call attention, however, to the fact that the doctrine as heretofore stated has the approval of the supreme court of the State of Nebraska, from which State this case comes, and is also stated and reinforced by numerous citations by the leading text-writers on the law of insurance. Home Fire Ins. Co. of Omaha *v.* Hammang Bros. & Co., 44 Neb., 566; Joyce on Insurance, sec. 515; Ostrander on Fire Insurance, sec. 243; May on Insurance, 2nd ed., sec. 497. The doctrine in question rests upon the ground that facts made

known to the agent of an insurance company who is empowered by it to solicit insurance, countersign and issue policies and collect premiums, is the knowledge of his principal and that a fraud would be perpetrated if an insurance company, through the medium of its agents, was allowed to deliver one of its policies and accept the premium thereon with knowledge of facts which under its provisions rendered it void *ab initio*. To prevent the perpetration of such frauds the courts have very generally held the insurer estopped from taking advantage of a condition or conditions found in one of its issued policies which in the light of known facts rendered the same void from the time of its delivery, or they have indulged in the charitable presumption that the insurer intended to waive the benefit of such a provision or that through accident or mistake it failed to modify the condition before the delivery of its policy, as it intended to do, so as to render it valid.

It is contended, however, in behalf of the insurer that by virtue of the conditions of its policy above quoted the rule of law heretofore stated is inapplicable to the case in hand. It is said, in substance, that no provision of its policy as printed and delivered to the insured can be denied its legitimate force and effect except by virtue of a written indorsement on the policy; that the insurance company has effectually deprived itself of the power to waive any of the conditions of its policy except by a written indorsement thereon, and that it has succeeded in framing a contract which is wholly exempt from the equitable doctrine of estoppel and waiver. This court decided, however, in Firemen's Fund Insurance Co. *v.* Norwood, 32 U. S. App., 490, 499; 69 Fed. Rep., 71, that "parties to contracts cannot disable themselves from making a contract allowed by law in any mode in which the law allows contracts to be made," and that "a written contract may be changed by parol and a parol one changed by a writing despite any provision in the contract to the contrary;" and the law to that effect is, as we think, well established by the authorities there cited as well as by other authorities that are referred to in Farnum *v.* Phœnix Ins. Co., 83 Cal., 246, 261. It has also been held that such clauses as those that are relied upon by the insurer to deprive itself of the power to contract otherwise than by some writing, should be given effect, if it all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument and that they should not be considered as having relation to acts done by the company or its agents at the inception of the contract which are sufficient, notwithstanding provisions that it may contain, to render it valid through the operation of the
49 doctrine of estoppel or waiver. Walsh *v.* Hartford Fire Ins. Co., 73 N. Y., 5, 11; Woodruff *v.* Imperial Fire Ins. Co. of London, England, 83 N. Y., 134, 141; Mutual Benefit Life Ins. Co. *v.* Robison, 19 U. S. App., 266, 274; 58 Fed. Rep., 723, 728. When an insurance company delivers a policy and accepts the premium thereon it is presumed that its intention is to make a contract which, in the light of all facts then known to it, will afford indemnity and it is beyond its power, by any provision that may be found in its

policy, to overcome the force of that presumption or to avoid the effect of acts or declarations which from an equitable standpoint are sufficient to raise an estoppel *in pais*. Thus, in the case of Wood *v.* American Fire Ins. Co., 149 N. Y., 382, it appeared that an agent of the insurance company issued a policy with knowledge of a fact which under its terms rendered it void *ab initio*, but notwithstanding the fact that the policy in suit was a standard policy which contained conditions similar to those that are invoked in the case at bar, it was held that the condition under which the forfeiture was asserted must be regarded as having been waived, as otherwise the insurer would be put in the attitude of accepting a premium for a policy which was known at the time to be of no force and effect. The court said, in substance, that it had long been settled that general agents of an insurance company may waive stipulations and provisions contained in a policy with respect to the conditions upon which it shall have inception and go into operation as a contract, by delivering it with knowledge of all the facts and receiving the premium. A similar ruling was made in Robbins *v.* Springfield Fire Ins. Co., 149 N. Y., 477, where a policy was issued by the agent of an insurance company with knowledge of the existence of an incumbrance on the insured property, which fact was not indorsed in writing on the policy as it should have been by the terms thereof to render it operative. The policy in that case contained a provision to the effect that no officer, agent or other representative of the company should have power to waive any condition or provision thereof, except such as might by the terms of the policy be indorsed thereon or added thereto, and that no such officer or agent should be deemed to have waived any provision of the policy unless the waiver was written thereon. Nevertheless, it was ruled that the insurance company had either waived the condition rendering the policy void or was estopped by the conduct of its agent from pleading the condition and the existence of the incumbrance as a defense. And in the case of Farnum *v.* Phœnix Ins. Co., 83 Cal., 246, 259, it was also held, in substance, that an insurance company was estopped from denying that one of its policies had taken effect when it appeared that it had been delivered by one of its agents who had power to deliver policies and who had extended credit for the premium by an oral agreement, although the policy contained a provision that the company should not be liable thereon until the premium was paid and a further provision that nothing less than a specific agreement indorsed on the policy should operate as a waiver of any of its provisions.

We are of opinion, therefore, that the delivery by the agent of the insurance company of the policy in suit with knowledge at the time of the existence of the prior insurance estops the insurer from pleading the prior insurance as a defense. Its agent by whom the delivery of the policy was made had power to deliver it and collect the premium and to receive notice of any existing insurance. In doing these acts he was for the time being the company and no obligation rested on the insured to insist that the existence of the outstanding insurance should be indorsed on the policy

in suit if the insurer, with knowledge of its existence, did not elect to do so but delivered the contract without such indorsement. He had the right to assume because of the delivery of the policy under the circumstances aforesaid that the insurer had determined to accept the risk notwithstanding the other insurance.

The point seems to be made in the brief that the plaintiff below in its petition and reply pleaded a waiver and that the judgment below cannot be supported because it is founded on estoppel. With reference to this suggestion it is only necessary to say that the plaintiff pleaded the facts and circumstances under which the policy was issued and the knowledge possessed by the insurer at the time, substantially as hereinbefore set forth, and in view thereof alleged that the defendant company had not only *waived* the provision of its policy on which it relied as a defense but was also *estopped* from asserting it. We perceive no error in this method of pleading, nor was any exception taken thereto in the trial court.

Judgment below is accordingly *affirmed*.

SANBORN, *Circuit Judge*, dissenting:

The question which this case presents has long been the subject of conflicting decisions. In Carpenter *v.* Providence Washington Ins. Co., 16 Pet., 495, 496, 511, the policy contained this stipulation: "And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation and mentioned in or endorsed upon the policy, then this insurance shall be void and of no effect." There was other insurance upon the property at the time this policy was issued. Mr. Justice Story expressed the unanimous opinion of the supreme court upon the question in controversy in this case in these words: "The third instruction prayed the court to instruct the jury, that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed, but instructed the jury, that at law, whatever might be the case at equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect." This decision was rendered in 1842, has never been overruled, and in 1897 the circuit court of appeals for the seventh circuit reached the same conclusion. Union National Bank *v.* German Ins. Co., 34 U. S. App., 397, 402; 18 C. C. A., 203, 206; 71 Fed. Rep., 473, 476; United Fire-

men's Ins. Co. *v.* Thomas, 53 U. S. App., 517, 521; 27 C. C. A., 42, 44; 82 Fed. Rep., 406, 408.

51 A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for *the seventh circuit* are right and for the following reasons:

1. If the solicitor of this company had had unlimited power to act for it, had known of the prior insurance and had made a parol agreement or representation before or at the time of the delivery of the policy that the policy should be valid without the indorsement of the permission to carry the prior insurance, that agreement or representation would have been futile and the written stipulation that the policy was void without the indorsement would have prevailed over the parol contract under the familiar rule that all prior and cotemporaneous oral negotiations are merged in the written agreement. Since the decision in Firemen's Fund Ins. Co. *v.* Norwood, to which the writer has never assented, this court has frequently held that no representation, promise or agreement made, or opinion expressed in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail over the plain provisions and just interpretation of the written contract. Insurance Co. *v.* Henderson, 32 U. S. App., 536, 540, 543, 547; 16 C. C. A., 390, 391, 393, 395; 69 Fed. Rep., 762, 764, 766; New York Life Ins. Co. *v.* McMaster, 57 U. S. App., 638, 648–652; 30 C. C. A., 532, 538–540; 87 Fed. Rep., 63, 69–72; Insurance Co. *v.* Mowry, 96 U. S., 544, 547; Assurance Co. *v.* Norwood, 57 Kan., 610, 611, 613; 47 Pac., 529, 530, 532; Association *v.* Kryder, 5 Ind. App., 430, 435; 31 N. E., 851; Union National Bank *v.* German Ins. Co., 34 U. S. App., 397; 18 C. C. A., 203; 71 Fed., 473; Insurance Co. *v.* Teter, 136 Ind., 672, 673, 676, 679; 36 N. E., 283; Burt *v.* Bowles, 69 Ind., 1; Clodfelter *v.* Hulett, 72 Ind., 137; Hudson Canal Co. *v.* Pennsylvania Canal Co., 8 Wall., 276, 290; Insurance Co. *v.* Lyman, 15 Wall., 664; Pearson *v.* Carson, 69 Mo., 550; Insurance Co. *v.* Neiberger, 74 Mo., 167; Lewis *v.* Ins. Co., 39 Conn., 100. As a prior or cotemporaneous oral agreement that the policy should be valid without the indorsement of the prior insurance could not avoid the written stipulation that it should be void, much less would the mere knowledge of both parties that the prior insurance existed without any agreement concerning it have that effect.

Moreover, this stipulation of the policy is a wise and salutary one and it ought to be enforced. Its purpose is to prevent fraud and perjury by reducing to writing the entire agreement of the parties relative to the amount of indemnity upon the property insured and, if enforced, it admirably accomplishes that object. A refusal to enforce it or any evasion of it throws wide the door to fraud and perjury and practically deprives the insurance companies of their right to contract for a limitation of the amount of insurance on the property. For if that limitation may be avoided by testimony that some agent knew of the existence of other insurance which was not indorsed the temptation to find such testimony will often be great

and there is no way in which the companies can protect themselves against its discovery. "A company which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence and by this the insured has assented to be bound." Kyte *v.* Commercial Union Assurance Co., 144 Mass., 43, 46; Hale *v.* Mechanics' Ins. Co., 6 Gray, 169; Worcester Bank *v.* Hartford Ins. Co., 11 Cush., 265.

52 2. The solicitor of the insurance company had no authority by oral agreement, by knowledge, by waiver, by estoppel, or in any other way to make a valid contract of insurance here without the indorsement upon the policy of the permission to carry the prior insurance and the insured knew that he had no such authority when it took its policy.

It is an established principle of the law of agency that a principal may limit the powers of his agent and that all parties who deal with the agent with knowledge of the limitation are bound by it. The insurance company had the right under this rule to limit the power of its solicitor to consent to other insurance to a written consent indorsed on the policy and it had the right to limit his power to deliver valid policies to those upon which all other existing insurance was indorsed in writing. The company made these limitations upon the powers of this solicitor by the express terms of its policy and the insured by accepting the policy was not only charged with knowledge of the existence of these limitations but it expressly agreed to their terms and their effect. It was beyond the powor of the solicitor to deliver any valid policy upon which the concurrent insurance was not endorsed and the insured knew it and agreed that any policy he should so deliver should be void when it received it. This policy was of that character and was consequently void. "When a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority and the consent or act of the agent not so endorsed is void." Quinlan *v.* Ins. Co., 133 N. Y., 356, 364; Walsh *v.* Hartford Fire Ins. Co., 5, 10; Marvin *v.* Universal Life Ins. Co., 85 N. Y., 278, 283; Moore *v.* H. F. Ins. Co., 141 N. Y., 219, 224; Kyte *v.* Commercial Union Assurance Co., 144 Mass., 43, 46; Ruthven *v.* American Fire Ins. Co., 60 N. W. (Iowa), 663, 666; Insurance Co. *v.* Gibbons, 43 Kan., 15; 22 Pac., 1010; Cleaver *v.* Traders' Ins. Co., 39 N. W. (Mich.), 571; Weidert *v.* State Ins. Co., 24 Pac. (Ore.), 242; Smith *v.* Niagara Fire Ins. Co., 15 Atl. (Vt.), 353; Hankins *v.* Rockford Ins. Co., 35 N. W. (Wis.), 34; Gould *v.* Ins. Co., 51 N. W. (Mich.), 455; Clevenger *v.* Ins. Co., 3 N. W. (Dak.), 313; Enos *v.* Ins. Co., 8 Pac. (Cal.), 379; Gladding *v.* Ins. Co., 66 Cali., 6; Northwestern National Ins. Co. *v.* Mize, 34 S. W., 670. "When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured so as to change the conditions of the policy or to dispense with the performance of any essential requisite contained therein

either by parol or writing and the holder of the policy is estopped by accepting the policy from setting up or relying upon powers of the agent in opposition to limitations and restrictions in the policy." Cleaver *v.* Traders' Ins. Co., 65 Mich., 527; 32 N. W., 660, 663.

3. No fraud was perpetrated on the insured in this case, for there could have been no fraud without deceit, and the insured was not deceived. It knew that there was other insurance upon the property and it knew that the solicitor of the company had no power to deliver a valid policy unless the concurrent insurance was indorsed upon it and it agreed with the company that any policy
53 which this solicitor should deliver should be void if the concurrent insurance was not indorsed. The insured was therefore neither deceived nor defrauded. It is the insurance company that was deceived and the insurance company that is defrauded, if it is compelled to pay this indemnity. Its agent acting without authority and the insured who knew he had no authority make a void contract and agree that it shall be void and then by the plea of a waiver that was never intended and an estoppel that did not exist seek to charge the company with the penalty of their conspiracy or carelessness.

There seems to me to be no ground for a waiver by, or an estoppel of the insurance company in this case for several reasons, (1) because the company expressly limited the power of its solicitor to make waivers or work estoppels of the character here invoked to those made in writing by indorsement upon the policy and it brought notice of this limitation home to the insured by an express stipulation in the policy which the insured accepted, (2) because an indispensable element of an estoppel is some act, statement or representation which tends to deceive the insured and thereby induces it to adopt a course of action or a state of inaction that it would not otherwise have taken, and this case contains no such element. The insured knew that there was other insurance. It knew that it was not indorsed upon the policy. It knew that the solicitor had no power to deliver a valid policy without such an indorsement and it knew that it agreed that without this indorsement its policy should be void, for all these things were written in the contract and the insured was charged with knowledge of its contents, (3) because there can be no waiver without an intent to waive and no intent to waive can be deduced or inferred from the mere fact of knowledge in the face of an express written stipulation to the contrary made and delivered at the time, (4) because no estoppel or waiver based on acts or knowledge prior to or contemporaneous with the making of an express written agreement on the subject can prevail over the express terms of that contract which as conclusively merges and supersedes all prior and contemporaneous negotiations and understandings by estoppel and by waiver as by words. Insurance Co. *v.* Mowry, 96 U. S., 547, 548; United Firemen's Ins. Co. *v.* Thomas, 82 Fed., 409.

In my opinion the judgment below should be reversed and judgment should be entered for the insurance company.

Filed March 26, 1900.

54 (*Judgment.*)

And on the twenty-sixth day of March, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *March* 26, 1900.

THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,
vs.
THE GRAND VIEW BUILDING ASSOCIATION.

In error to the circuit court of the United States for the district of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the Grand View Building Association have and recover against the Northern Assurance Company of London, England, the sum of twenty dollars for its costs herein, and have execution therefor.

March 26, 1900.

55 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fifty-four pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Northern Assurance Company of London, England, plaintiff in error, *vs.* Grand View Building Association, defendant in error, No. 1248, as full, true, and complete as the same remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at office, in the city of St. Louis, Missouri, this twenty-eighth day of April, A. D. 1900.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

56 United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error,
v.
GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.
} No. 1248. Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the certified copy of the entire record in the above-entitled cause in the circuit court of appeals, which was filed by the above-named plaintiff in error in the Supreme Court of the United States with its petition to said Supreme Court for a writ of certiorari requiring said cause to be certified to said Supreme Court for its review and determination under section 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, shall be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on Monday, May 21, 1900, in the said case of Northern Assurance Company of London, England, plaintiff in error, *v.* Grand View Building Association, defendant in error, and the clerk of the said United States circuit court of appeals for the eighth circuit is hereby requested to send up to the said Supreme Court of the United States a copy of this stipulation as his return to said writ of certiorari.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, *Plaintiff in Error,*
By CHARLES J. GREENE,
RALPH W. BRECKENRIDGE, *Its Attorneys.*
GRAND VIEW BUILDING ASSOCIATION,
By HALLECK F. ROSE, *Its Attorney.*

57 Endorsed: U. S. circuit court of appeals, eighth circuit. Northern Assurance Co. of London, England, pl'ff in error, *v.* Grand View Building Ass'n, def't in error. Stipulation as to clerk's return to writ of certiorari. Filed May 26, 1900. John D. Jordan, clerk.

A true copy.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Northern Assurance Company of London, England, is plaintiff in error and Grand View Building Association is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Nebraska, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
59 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of May, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

60 [Endorsed:] File No., 17,753. Supreme Court of the United States. No. 639, October term, 1899. Northern Assurance Company of London, England, *vs.* Grand View Building Association. Writ of certiorari and return. Filed May 26, 1900. John D. Jordan, clerk. Filed May 29, 1900. J. H. McK., cl'k.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The Northern Assurance Company of London, England, plaintiff in error, *vs.* The Grand View Building Association is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office, in St. Paul, Minnesota, this twenty-sixth day of May, A. D. 1900.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.